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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 LON S. NEVLER,

Civil No. 07-6201-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15
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26 AIKEN, Judge:

27 Claimant, Lon Nevler, brings this action pursuant to the
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1 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
2 1383(c)(3), to obtain judicial review of a final decision of the
3 Commissioner denying his application for disability insurance
4 benefits under Title II of the Act and for Supplemental Security
5 Income (SSI) disability benefits under Title XVI of the Act. For
6 the reasons set forth below, the Commissioner's decision is
7 reversed and remanded for payment of benefits.

8 PROCEDURAL BACKGROUND

9 Plaintiff protectively filed applications for disability
10 insurance benefits and SSI disability benefits on May 27, 2004.
11 Tr. 19. The applications were denied initially and on
12 reconsideration. Id. On August 3, 2006, a hearing was held
13 before an administrative law judge (ALJ). On December 20, 2006,
14 the ALJ issued a decision finding plaintiff not disabled because
15 he could perform other work existing in significant numbers in
16 the national economy. Tr. 16-25. On June 15, 2007, the Appeals
17 Council denied plaintiff's request for review, making the ALJ's
18 decision the Commissioner's final decision Tr. 7-10. See 20
19 C.F.R. §§ 404.981, 416.1481, 422.210.

20 STATEMENT OF THE FACTS

21 At the time of the ALJ hearing, plaintiff was 56 years old,
22 had completed the 12th grade, and earned a general equivalency
23 diploma (GED). Tr. 53, 69, 265, 282-83. Plaintiff had past
24 relevant work experience as a security guard, salesperson,
25 telemarketer, and wildland firefighter. Tr. 26, 99, 304-07.
26 Plaintiff last worked part-time in January 2003. Tr. 304.
27 Plaintiff alleged disability beginning on June 15, 1999, due to
28 social anxiety disorder and temporomandibular joint (TMJ)

1 disorder. Tr. 19, 53, 65, 265.

2 STANDARD OF REVIEW

3 This court must affirm the Secretary's decision if it is
 4 based on proper legal standards and the findings are supported by
 5 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
 6 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
 7 mere scintilla. It means such relevant evidence as a reasonable
 8 mind might accept as adequate to support a conclusion."
 9 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
 10 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
 11 The court must weigh "both the evidence that supports and
 12 detracts from the Secretary's conclusions." Martinez v. Heckler,
 13 807 F.2d 771, 772 (9th Cir. 1986).

14 The initial burden of proof rests upon the claimant to
 15 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
 16 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
 17 an "inability to engage in any substantial gainful activity by
 18 reason of any medically determinable physical or mental
 19 impairment which can be expected . . . to last for a continuous
 20 period of not less than 12 months. . . ." 42 U.S.C.
 21 § 423(d)(1)(A).

22 The Secretary has established a five-step sequential
 23 process for determining whether a person is disabled. Bowen v.
 24 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
 25 416.920. First the Secretary determines whether a claimant is
 26 engaged in "substantial gainful activity." If so, the claimant
 27 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
 28 §§ 404.1520(b), 416.920(b).

1 In step two the Secretary determines whether the claimant
2 has a "medically severe impairment or combination of
3 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
4 §§ 404.1520(c), 416.920(c). If not, the claimant is not
5 disabled.

6 In step three the Secretary determines whether the
7 impairment meets or equals "one of a number of listed impairments
8 that the Secretary acknowledges are so severe as to preclude
9 substantial gainful activity." Id.; see 20 C.F.R.
10 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
11 presumed disabled; if not, the Secretary proceeds to step four.
12 Yuckert, 482 U.S. at 141.

13 In step four the Secretary determines whether the claimant
14 can still perform "past relevant work." 20 C.F.R.
15 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
16 disabled. If she cannot perform past relevant work, the burden
17 shifts to the Secretary. In step five, the Secretary must
18 establish that the claimant can perform other work. Yuckert, 482
19 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
20 (f). If the Secretary meets this burden and proves that the
21 claimant is able to perform other work which exists in the
22 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
23 416.966.

24 DISCUSSION

25 1. The ALJ's Findings

26 At step one, the ALJ found that plaintiff had not engaged
27 in substantial gainful activity during the relevant time period.
28 Tr. 22, Finding 2. See 20 C.F.R. §§ 404.1520(b), 416.920(b).

1 At step two, the ALJ found that plaintiff had the following
2 severe impairments: post-traumatic stress disorder (PTSD), a
3 social anxiety disorder, and a personality disorder with anti-
4 social features. Tr. 22, Finding 3. See 20 C.F.R. §§
5 404.1520(c), 416.920(c).

6 At step three, the ALJ found that plaintiff did not have an
7 impairment or combination of impairments that met or equaled any
8 of the impairments in the Listings of Impairments. Tr. 23,
9 Finding 4. See 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d),
10 416.920(a)(4)(iii), 416.920(d). In determining plaintiff's
11 residual functional capacity (RFC), the ALJ found that plaintiff
12 was "without physical restrictions," and that he could "perform
13 simple, routine tasks and instructions," "can have occasional
14 contact with co-workers but should have no contact with the
15 public." The ALJ stated "there are no other limitations." Tr.
16 23, Finding 5. See 20 C.F.R. §§ 404.1520(e), 404.1545,
17 416.920(e), 416.945.

18 At step four, the ALJ found that plaintiff was unable to
19 perform any of his past relevant work. Tr. 16, Finding 6. See
20 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1520(f), 416.920(a)(4)(iv),
21 416.920(f).

22 Finally, at step five, the ALJ found that plaintiff could
23 perform other work existing in significant numbers in the
24 national economy as a shipping and receiving weigher, a
25 sweeper/cleaner, a printed products assembler, and a
26 groundskeeper. Tr. 24-25, Finding 10. See 20 C.F.R. §§
27 404.1520(a)(4)(v), 404.1520(g), 416.920(a)(4)(v), 416.920(g).

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1 2. Plaintiff's Allegations of Error

2 A. The ALJ Erred in Failing to Include Cervical
3 Degenerative Disc Disease and Radiculopathy as "Severe"
4 Impairments at Step Two of the Sequential Analysis.

5 As stated above, at step two of the inquiry, the
6 Commissioner determines whether plaintiff has a medically severe
7 impairment or combination of impairments. Smolen v. Chater, 80
8 F.3d 1273, 1290 (9th Cir. 1996). An impairment can be found "not
9 severe" only if the evidence establishes a slight abnormality
10 that has "no more than a minimal effect on a individual's ability
11 to work." Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988).
12 On review, the court must determine whether the medical evidence
13 "clearly established" that plaintiff's degenerative disc disease
14 was nonsevere. Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir.
15 2005).

16 The ALJ found that imaging studies revealed multilevel
17 degenerative cervical disc changes, but concluded that "there was
18 no evidence of neurological compromise." Tr. 22. The ALJ stated
19 that, other than cervical spasm and limited range of motion,
20 "there was no evidence of decreased grip or other motor or
21 neurological functioning." Id. Finally, the ALJ found that
22 plaintiff's ability to bicycle and walk "suggests he was not
23 particularly limited." Id.

24 I disagree and find that the medical evidence fails to
25 "clearly establish" that plaintiff's degenerative disc disease is
26 nonsevere. On February 7, 2005, plaintiff reported a three month
27 history of neck pain, radiating into his shoulders and down his
28 arms. Tr. 213. His hands tingled and burned. Id. He had

1 limited range of motion in his neck. Id. Full rotation to
2 either side caused pain in his trapezium and scapular muscles.
3 Id. Dr. Mentzer, plaintiff's long-term treating physician, found
4 among other issues, neck and shoulder pain suggesting
5 radiculopathy affecting plaintiff's arms. Id. On February 17,
6 2005, cervical spine x-rays revealed degenerative changes. Tr.
7 216. On March 12, 2005, a cervical MRI found diffuse cervical
8 spondylosis with considerable disc space narrowing at C4-5, C5-6
9 and C6-7. Tr. 214. The test further found broad based disc and
10 osteophyte causing mild canal stenosis at C6-7 with a right-sided
11 asymmetric annular bulge and osteophyte, as well as foraminal
12 narrowing, at C5-6. Id. There was moderate canal stenosis
13 secondary to a right sided disc protrusion, and broad based disc
14 and posterior osteophytosis, causing bilateral foraminal
15 narrowing at C4-5. Id. The MRI found borderline canal stenosis
16 secondary to broad based disc and osteophyte without focal disc
17 protrusion at C3-4. Id.

18 On March 21, 2005, plaintiff reported neck, shoulder and
19 arm pain. Tr. 212. Dr. Mentzer found that the MRI results
20 showed "considerable pathology." Id. Plaintiff had limited
21 range of motion in his neck, increased pain with elevation at
22 both shoulders, and decreased strength of handgrip bilaterally.
23 Id. There was diminished pinprick sensation of the left forearm.
24 Id. Dr. Mentzer found plaintiff had radicular symptoms. Id.

25 Upon Dr. Mentzer's request, on April 7, 2005, plaintiff was
26 evaluated by Dr. Kitchel, an orthopedic surgeon. Tr. 202.
27 Plaintiff reported a feeling of pins and needles and numbness in
28 both arms. Id. He was dropping things from his hands. Id. Dr.

1 Kitchel found that plaintiff had difficulty heel walking and had
2 spasms in his cervical musculature. Id. He had moderate
3 tenderness in his low cervical and upper thoracic spine and in
4 his left cervical root origins. Id. Dr. Kitchel noted that
5 plaintiff had decreased sensation on his left side at C-6. Id.
6 Dr. Kitchel diagnosed plaintiff with cervical spondylosis and
7 recommended a therapy/exercise program. Tr. 205.

8 On September 9, 2005, after examining plaintiff, Dr.
9 Mentzer found plaintiff had a limited range of motion in his
10 neck, with rotation and extension greatly limited. Tr. 210. On
11 June 2, 2006, Dr. Mentzer wrote a letter to the agency, stating
12 that plaintiff continued to experience right TM joint pain,
13 chronic anxiety, elements of bipolar disease and chronic neck
14 pain with radicular symptoms into his arms. Tr. 208. An MRI had
15 shown considerable degenerative changes. Id. Dr. Mentzer wrote:

16 He does have considerable disability in regards to
17 gainful employment. The neck problem causing the
18 radicular symptoms in his arms would certainly
19 interfere with any use of his upper extremities on
a regular basis, especially lifting, pulling,
straining, turning his neck with driving and
especially any work reaching overhead.

20 I do feel that his major disability is psycho-emotional,
21 and would cause considerable difficulty in a work-
22 place situation, including concentration, persistence,
23 and especially interpersonal interaction. It is
my opinion that he is at least moderately disabled
by this on a more or less permanent basis.

24 Tr. 208.

25 Relying on Dr. Mentzer's opinion, plaintiff's degenerative
26 disc disease would "certainly interfere" with any use of
27 plaintiff's upper extremities on a regular basis, especially
28 lifting, pulling, straining, turning his neck with driving, and

1 especially any requirement to reach his arms above his head. Tr.
2 208. The ALJ erred in failing to include these limitations in
3 plaintiff's RFC assessment, and further failed to include
4 plaintiff's cervical limitations in the hypothetical posed to the
5 vocational expert (VE). In conclusion, the medical evidence
6 failed to "clearly establish" that plaintiff's degenerative disc
7 disease is nonsevere. Webb, 433 F.3d at 687.

8 B. The ALJ Failed to Provide Clear and Convincing Reasons
9 for Failing to Credit Plaintiff's Treating Physician, Dr.
10 Mentzer.

11 Dr. Mentzer found plaintiff "at least moderately disabled"
12 by psychological problems "on a more or less permanent basis."
13 Tr. 208. If a treating physician's opinion is supported by
14 medically acceptable diagnostic techniques and not inconsistent
15 with other substantial evidence in the record, that opinion is
16 given controlling weight. Holohan v. Massanari, 246 F.3d 1195,
17 1202 (9th Cir. 2001). An ALJ may reject a treating physician's
18 uncontradicted opinion based on "clear and convincing" reasons in
19 the record. Id. at 1202. Even if the treating physician's
20 opinion is inconsistent with other evidence in the record, that
21 opinion is still entitled to deference. Id.

22 The defendant asserts first that the ALJ properly rejected
23 Dr. Mentzer's opinion regarding plaintiff's physical condition
24 because it conflicted with Dr. Kitchel's examination, the
25 orthopedic surgeon. Def's Brief, p. 9. Defendant states that
26 Dr. Kitchel's examination found plaintiff not "significantly
27 limited." It is notable that the defendant fails to address Dr.
28 Kitchel's further finding that plaintiff has decreased sensation

1 at C-6. Tr. 204. Dr. Mentzer also noted that plaintiff had
2 diminished pinprick sensation of the left forearm, indicating
3 cervical limitations. Tr. 212. Moreover, Dr. Kitchel failed to
4 address plaintiff's functional limitations. Tr. 203-05.

5 The ALJ also rejected Dr. Mentzer's conclusions regarding
6 plaintiff's psychological condition, stating that Dr. Mentzer's
7 use of the word "moderate" in his June 2006 assessment did not
8 accord with the Social Security disability evaluation system.
9 Tr. 27. However, the ALJ then stated: "to be fair, it seems that
10 the claimant may have some limitations in social functioning,
11 concentration, persistence and pace at the "moderate" level, as
12 discussed below." Tr. 26-27. The ALJ concluded by adopting the
13 opinion of the Disability Determination Service (DDS) that
14 plaintiff had "moderate" mental limitations. Tr. 26. Although
15 the defendant objects to Dr. Mentzer's use of the phrase
16 "moderately disabled" regarding plaintiff, defendant fails to
17 address Dr. Mentzer's further assessment that due to plaintiff's
18 mental illness, he would have "considerable difficulty in a
19 workplace situation, including concentration, persistence, and
20 especially interpersonal interaction." Tr. 208.

21 The Commissioner provided inadequate reasons for failing to
22 fully credit plaintiff's treating physician's opinion.
23 Therefore, Dr. Mentzer's opinion is credited as true as a matter
24 of law. Widmark v. Barnhart, 454 F.3d 1063, 1069 C. (9th Cir.
25 2006).

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1 C. The ALJ Erred in Failing to Credit the Opinion of
2 Plaintiff's Treating Therapist.

3 A mental health therapist is considered an "other source"
4 as described in 20 C.F.R. § 404.1513(d), who may provide insight
5 into the severity of the impairment and how it affects
6 plaintiff's ability to function. The opinion of a "other source"
7 may be given more weight than an acceptable source "if he or she
8 has seen the individual more often than the treating source and
9 has provided better supporting evidence and a better explanation
10 for his or her opinion." SSR 06-3p.

11 Here, plaintiff was treated for over a year by Cori
12 Taggart, a mental health therapist. Taggart opined that
13 plaintiff's psychological impairments prevented him from being
14 able to obtain and sustain gainful employment. Tr. 219, 221.
15 The ALJ found that Taggart was not an acceptable source and did
16 not credit her comments or opinions. Tr. 27. Specifically, the
17 ALJ found that Taggart's June 2006 report was not supported by
18 clinical findings, was based on plaintiff's subjective
19 statements, and was contradicted by plaintiff's much improved
20 functioning on antidepressant medication. Id.

21 When viewing Taggart's treatment records in light of the
22 entire treatment relationship, considering the length of the
23 treatment relationship, the frequency of visits, and the nature
24 and extent of the treatment received, Taggart's records reveal
25 objective signs of mental illness and support her conclusions
26 regarding plaintiff's limitations. 20 C.F.R. §§
27 404.1527(d)(2)(I), (ii). Taggart's June 2006 Case Update was a
28 summary of her treatment of plaintiff at the agency's request.

1 Taggart described plaintiff as having some period of increased
2 stabilization, but also some periods of destabilization. Tr.
3 218. She found that plaintiff struggled to attain even a minimal
4 level of functioning. Id. Taggart described plaintiff as having
5 a high degree of arousal, related to external triggers. Tr. 219.
6 In Taggart's Annual Review in January 2006, she noted that
7 plaintiff appeared restless, with loud speech that was intense at
8 times. Tr. 26. She described plaintiff's affect as anxious,
9 angry and sad. Id. She found that his memory and concentration
10 were impaired. Id. In February 2005, Taggart noted that
11 plaintiff had rapid speech, and his affect/mood was labile,
12 anxious, angry, depressed and sad. Tr. 254. She also noted that
13 his concentration, memory and judgment were impaired, finding
14 that he rambled and forgot things. Id. In July 2005, Taggart
15 noted that plaintiff was tense and that his eyes were often
16 narrowed, with a mistrustful, fearful, angry expression. Tr.
17 220. In September 2005, while plaintiff showed some improvement,
18 by January 2006, his anxiety increased after moving back to
19 Eugene. Tr. 224, 235. By February 2006, plaintiff's sleep had
20 worsened, and he felt antsy and irritable. In April 2006, after
21 another medication change, he felt even more anxious, irritable
22 and isolated. Tr. 232.

23 I find that Taggart's observations and conclusions were
24 significant and probative as an "other source." The ALJ failed
25 to provide reasons, supported by substantial evidence, for
26 rejecting Taggart's opinions.

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1 CONCLUSION

2 The Commissioner's decision is not based on substantial
3 evidence. Therefore, this case is reversed and remanded for
4 payment of benefits. This case is dismissed.

5 IT IS SO ORDERED.

6 Dated this 26 day of August 2008.

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10 Ann Aiken
11 United States District Judge
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